

1 education and past relevant work experience an office administrator.
2 [AR 36, 150.] Plaintiff alleges disability on the basis of three
3 discs injured in her lower back, upper extremity limitations, the need
4 to utilize a cane, the need to lie down due to back pain, obesity and
5 depression. [AR 39; Joint Stipulation ("JS") at 10.]

6 Plaintiff applied for disability insurance benefits ("DIB") on
7 October 18, 2005, and supplemental security income ("SSI") on
8 September 15, 2005, alleging disability since August 24, 2004. [AR
9 28.] After the applications were denied initially and on
10 reconsideration, Plaintiff requested an administrative hearing on June
11 27, 2006. [AR 52-56.] In a written notice dated August 4, 2006, the
12 Commissioner informed Plaintiff that her request had been granted and
13 that Plaintiff would receive future notice setting the hearing date.
14 [AR 56-57.] The notice informed plaintiff that she had a right to
15 representation at the hearing, that a representative "can help you get
16 evidence, prepare for the hearing, and present your case at the
17 hearing," that "some private lawyers charge a fee only if you receive
18 benefits," and that "some organizations" may provide free legal
19 representation. [AR 56.] Subsequent notices dated May 17, 2007, and
20 May 24, 2007, informed Plaintiff of her right to representation. [AR
21 60-63.]

22 An administrative hearing was held on June 13, 2007. [AR 353.]
23 Plaintiff appeared without counsel. [Id.] At the start of the hearing,
24 the ALJ stated the following:

25 [I]t's my responsibility to see that you have a full and fair
26 hearing today, so I want to discuss with you some of the
27 important rights you have and talk about how we'll proceed today.
28 One of the most important rights you have is a right to counsel
or an attorney to represent you, but there's no requirement that
you be represented by counsel. You're entitled to proceed
representing yourself and you can have a witness testify on your

1 behalf. As I reviewed the exhibit file, I see that you've been
 2 sent notices advising you of your right to counsel. I see you're
 3 here without counsel at this time, so I'm thinking it appears
 that you've decided to proceed without counsel. Is that what you
 want to do?

4 Plaintiff responded, "Yes, sir." [AR 355.] The hearing then
 5 proceeded. [AR 355-87.] The ALJ subsequently denied benefits in a
 6 decision dated July 26, 2007. [AR 28-36.] When the Appeals Council
 7 denied review on August 19, 2008, the ALJ's decision became the
 8 Commissioner's final decision. [AR 4.]

9 **II. PROCEEDINGS IN THIS COURT**

10 Plaintiff's complaint was filed on October 10, 2008. On April 8,
 11 2009, defendant filed an answer and plaintiff's Administrative Record
 12 ("AR"). On July 6, 2009, the parties filed their Joint Stipulation
 13 ("JS") identifying matters not in dispute, issues in dispute, the
 14 positions of the parties, and the relief sought by each party. This
 15 matter has been taken under submission without oral argument.

16 **III. STANDARD OF REVIEW**

17 Under 42 U.S.C. § 405(g), a district court may review the
 18 Commissioner's decision to deny benefits. The Commissioner's (or
 19 ALJ's) findings and decision should be upheld if they are free of
 20 legal error and supported by substantial evidence. However, if the
 21 court determines that a finding is based on legal error or is not
 22 supported by substantial evidence in the record, the court may reject
 23 the finding and set aside the decision to deny benefits. See Aukland
 24 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
 25 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
 26 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
 27 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
 28

1 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
 2 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

3 "Substantial evidence is more than a scintilla, but less than a
 4 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
 5 which a reasonable person might accept as adequate to support a
 6 conclusion." Id. To determine whether substantial evidence supports
 7 a finding, a court must review the administrative record as a whole,
 8 "weighing both the evidence that supports and the evidence that
 9 detracts from the Commissioner's conclusion." Id. "If the evidence
 10 can reasonably support either affirming or reversing," the reviewing
 11 court "may not substitute its judgment" for that of the Commissioner.
 12 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

13 IV. DISCUSSION

14 A. ISSUES IN DISPUTE

15 The parties' Joint Stipulation raises the following disputed
 16 issues:

- 17 1. Whether the ALJ obtained an informed waiver of Plaintiff's
- 18 right to representation;
- 19 2. Whether the ALJ properly considered all of the relevant
- 20 medical evidence;
- 21 3. Whether the ALJ properly considered and developed the
- 22 vocational issues; and
- 23 4. Whether the ALJ properly considered Plaintiff's subjective
- 24 complaints and credibility.

25 [JS at 3.]

26 As noted above, Issue One is dispositive.

27 B. RIGHT TO REPRESENTATION

28 A Social Security claimant has a statutory right to be

1 represented by counsel at an administrative hearing. 42 U.S.C. § 406¹;
 2 20 C.F.R. §§ 404.1700, 416.1500. Although the absence of counsel,
 3 standing alone, does not deprive a claimant of a fair hearing, the
 4 Commissioner has a duty to inform the claimant of the right to
 5 counsel, so that the claimant may decide knowingly whether he or she
 6 wishes to waive this right. Edwards v. Sullivan, 937 F.2d 580, 585
 7 (11th Cir. 1991); Thompson v. Sullivan, 933 F.2d 581, 584 (7th Cir.
 8 1991); Clark v. Schweiker, 652 F.2d 399, 403 (5th Cir. 1981). A
 9 claimant must be informed not only of his or her right to counsel, but
 10 of the importance of having an attorney, of the availability of free
 11 legal services to represent indigent claimants, and the limits on fees
 12 to private counsel to twenty-five percent of retroactive benefits.
 13 Binion v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994); Smith v.
 14 Schweiker, 677 F.2d 826, 829 (11th Cir. 1982); Clark, 652 at 403; see
 15 also Blom v. Barnhart, No. 04-C-0912, 363 F. Supp. 2d 1041, 1046 (E.D.
 16 Wis. March 26, 2005)(finding uninformed waiver invalid even though
 17 claimant was an attorney).

18 If a claimant's waiver is invalid, reversal is appropriate if
 19 "the claimant can demonstrate prejudice or unfairness in the
 20 administrative proceedings." Vidal v. Harris, 637 F.2d 710, 713 (9th
 21 Cir. 1981)(quoting Hall v. Sec. of Health, Ed. and Welfare, 602 F.2d
 22 1372, 1378 (9th Cir. 1979). Where a claimant is unrepresented by
 23 counsel, it is "incumbent upon the ALJ to conscientiously and

24
 25 ¹ The statute states, in pertinent part, "The Commissioner of
 26 Social Security shall notify each claimant in writing, together with
 27 the notice to such claimant of an adverse determination, of the
 28 options for obtaining attorneys to represent individuals in presenting
 their cases before the Commissioner of Social Security. Such
 notification shall also advise the claimant of the availability to
 qualifying claims of legal services organizations which provide legal
 services free of charge." 42 U.S.C. § 406(c).

1 scrupulously probe into, inquire of, and explore all the relevant
2 facts" at the hearing so as to protect the claimant's interests. Cox
3 v. Califano, 587 F.2d 988, 991 (9th Cir. 1978); see also Higbee v.
4 Sullivan, 975 F.2d 558, 561 (9th Cir. 1992); Key v. Heckler, 754 F.2d
5 1545, 1551 (9th Cir. 1985); Vidal, 637 F.2d at 713-14. When the
6 "heavy burden imposed by Cox" is not met in this context, and the
7 unrepresented claimant may have been prejudiced, "the interests of
8 justice demand that the case be remanded." Vidal, 637 F.2d at 714-15.

9 The record in this case indicates that Plaintiff's waiver of her
10 right to counsel was not fully informed. Neither the written notices
11 provided to Plaintiff prior to the hearing nor the ALJ's cursory
12 statement at the hearing advised Plaintiff of the twenty-five percent
13 limit on fees. See Binion, 13 F.3d at 245 (finding waiver invalid
14 when Plaintiff was not advised of twenty-five percent cap on fees);
15 Clark, 652 F.2d at 403 (same); Blom, 363 F. Supp. 2d at 1046 (same).
16 This explanation is particularly important "where shortage of funds is
17 likely to be an issue for the claimants" because they may believe,
18 incorrectly, that they cannot afford private counsel. Thompson, 933
19 F.2d at 585. Moreover, Plaintiff's limited education raises questions
20 as to whether she read the notices or responded to the ALJ's question
21 regarding her right to counsel with full understanding. See Vidal,
22 637 F.2d at 714 (finding "serious question" whether claimant with
23 limited reading skills validly waived right to counsel).

24 Plaintiff's lack of representation at the hearing was prejudicial
25 because the Commissioner's heavy burden to develop the record, imposed
26 by Cox, was not met. Vidal, 637 F.2d at 713-14. The transcript of
27 the administrative hearing indicates that Plaintiff was prejudiced by
28 an inadequate examination of the vocational expert: the testimony was

1 brief and did not include any inquiry as to whether an individual with
2 Plaintiff's limitations could perform substantial gainful activity
3 after taking into account, for example, Plaintiff's allegations that
4 she had upper extremity limitations and needed to use a cane. The
5 record further indicates that Plaintiff was completely incapable of
6 challenging the vocational expert's conclusions. [AR 387.] "Had the
7 claimant been represented by counsel at the hearing, it is likely that
8 cross-examination of the vocational expert would have revealed this
9 relevant information." Vidal, 637 F.2d at 715 (finding prejudice
10 under Cox when unrepresented claimant was ill-equipped to question
11 vocational expert). Accordingly, remand for further proceedings is
12 appropriate.

13 **C. REMAND FOR FURTHER PROCEEDINGS**

14 The decision whether to remand for further proceedings is within
15 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
16 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
17 further proceedings, or where the record has been fully developed, it
18 is appropriate to exercise this discretion to direct an immediate
19 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
20 remand for further proceedings turns upon their likely utility).
21 However, where there are outstanding issues that must be resolved
22 before a determination can be made, and it is not clear from the
23 record that the ALJ would be required to find the claimant disabled if
24 all the evidence were properly evaluated, remand is appropriate. Id.
25 Here, as set out above, outstanding issues remain before a finding of
26 disability can be made. Accordingly, remand is appropriate.

V. ORDERS

Accordingly, **IT IS ORDERED** that:

1. The decision of the Commissioner is **REVERSED**.

2. This action is **REMANDED** to defendant, pursuant to Sentence Four of 42 U.S.C. § 405(g), for further proceedings as discussed above.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: July 13, 2009

_____/S/_____
CARLA M. WOEHRLE
United States Magistrate Judge